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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/698,962	10/30/2003	James R. Casciani	009103-009740US TYHC:0095	8826
52144 7590 05/17/2007 Nelcor Puritan Bennett LLC c/o Fletcher Yoder PC P.O. BOX 692289 HOUSTON, TX 77269-2289				
EXAMINER WINAKUR, ERIC FRANK				
ART UNIT		PAPER NUMBER		
3768				
MAIL DATE		DELIVERY MODE		
05/17/2007		PAPER		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/698,962

Applicant(s)

CASCIANI ET AL.

Examiner

Eric F. Winakur

Art Unit

3768

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 22 February 2007.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 72-75 and 84-87 is/are pending in the application.
- 4a) Of the above claim(s) 73-75 and 85-87 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 72 and 84 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Continued Examination Under 37 CFR 1.114

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 22 February 2007 has been entered.
2. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Election/Restrictions

3. Applicant's election with traverse of the election in the reply filed on 22 February 2007 is acknowledged. The traversal is on the ground(s) that the withdrawal of the dependent claims from consideration was improper. This is not found persuasive because, as noted in the prior Office action, the withdrawal was based on Applicant's previous election (see the election **without traverse** in the reply filed 26 May 2005). Once Applicant elects an invention for prosecution, Applicant is not permitted to shift the elected subject matter. Applicant properly notes that upon allowance of the independent claims the requirement will be withdrawn and the dependent claims should also be allowed.

The requirement is still deemed proper and is therefore made FINAL.

Claim Rejections - 35 USC § 103

4. The rejection of claims 72 and 84 rejected under 35 U.S.C. 103(a) as being unpatentable over Lewis et al. in view of Baker et al. is hereby maintained for the reasons of record.

Double Patenting

5. The provisional rejection of claims 72 and 84 on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claim 14 of copending Application No. 11/407,725 is hereby maintained for the reasons of record.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

6. The provisional rejection of claims 72 and 84 on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claim 9 of copending Application No. 11/407,771 is hereby maintained for the reasons of record.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Response to Arguments

7. Applicant's arguments filed 22 February 2007 have been fully considered but they are not persuasive. Applicant alleges that because Lewis and Baker perform different measurement techniques that require different processing the references "teach away" from each other and the theoretical combination. Applicant contends that as a result, the combination is completely inappropriate. Contrary to Applicant's assertions, the combination is not inappropriate and the teachings of the references

Art Unit: 3768

suggest the claimed invention. In particular, the teaching of Baker was merely relied upon to show that 805 nm and 880 nm were known isobestic points of hemoglobin. The interaction of isobestic light with a hemoglobin molecule is not affected by the location in the body where the interaction occurs. That the references ultimately process their detected signals in different manners does not "teach away" from the combination, as Baker was merely relied upon to teach known details of the "physics" of light interacting with hemoglobin. The rejection is thus proper and is hereby maintained.

8. Applicant's filing of a terminal disclaimer with regard to the obviousness-type double patenting rejections is noted and has been accepted. Applicant's remarks regarding the provisional rejections under obviousness-type double patenting are noted. As conflicting claims remain between the co-pending applications, it is proper to maintain the rejection.

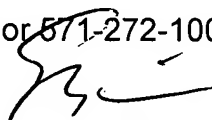
Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Eric F. Winakur whose telephone number is 571/272-4736. The examiner can normally be reached on M-Th, 7:30-5; alternate Fri.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Eleni Mantis-Mercader can be reached on 571/272-4740. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Art Unit: 3768

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.



Eric F Winakur
Primary Examiner
Art Unit 3768